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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. JAVIAD AKHTAR, Defendant and Appellant.	C042427 (Super. Ct. No. CR 01-1276)

A jury convicted defendant Javiad Akhtar of a number of offenses and enhancements based on his attack on his estranged spouse. Those pertinent to this appeal included attempted premeditated murder, torture through the infliction of great bodily injuries, and the theft or unauthorized use of a car. (Pen. Code, §§ 187/664, 206; Veh. Code, § 10851, subd. (a).) The trial court sentenced him to state prison.

The defendant argues that his extrajudicial statements to the police should be suppressed, that the trial court erred in refusing his special instruction on the manner in which the jury should infer the specific intent for the torture charge, and

that there is insufficient evidence to support the convictions for torture, attempted premeditated murder, and vehicle theft. Only the contention with respect to the vehicle theft has merit, as the People concede. We shall reverse count 5 and otherwise affirm the judgment.

FACTS

The victim and the two children of defendant and the victim all testified at trial. The following is a summary of their testimony (any conflicts in which are resolved in favor of the judgment).

The victim and the defendant separated in July 2000, when he moved out of their home. She obtained a restraining order against him in December 2000. Divorce proceedings were pending. As of February 28, 2001, the defendant had not seen his children since the separation.

On that date, the victim returned to her home about 4:30 p.m. after picking up the children (born 1991 and 1993) at school. There were no cars parked outside the house. The victim sat down on the sofa with her daughter while the children watched television. The defendant abruptly emerged from the bathroom, holding a pellet gun. The victim ran to the front door. The defendant fired at her, then stopped her escape by beating her on the head with the gun until it broke into two pieces. He dragged her into the kitchen.[1] Their daughter heard him use a phrase twice that in their culture meant he desired a

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[1] Their son testified the defendant first smothered the victim.

reconciliation. He began to stab the victim with a knife from his pocket.[2] Their son testified the defendant also stabbed her with a knife from the kitchen. The children testified that the defendant "started jumping on her back" a "[w]hole bunch of times." He laid a towel over the victim's face, grabbed the keys to her car, and left with the children, taking them to his sister's house. When the children questioned his actions, he told them to be quiet or else he would throw them under the wheels of the car.

The victim was hospitalized for over three weeks. She could not speak until May 2001, has recurring dizzy spells, and needs someone to watch her. The trauma surgeon described her injuries as including three deep stab wounds to the neck that perforated her esophagus and trachea, multiple cuts to her face, black eyes from a skull fracture, a broken cheekbone, and lacerations on her hand, thigh, and vaginal walls.

In the kitchen, investigators found two bent and bloodied knives, one of which also had hair on it. All the phone lines in the house had been cut.

By way of defense, the defendant presented evidence of an organic brain disorder, which left him with diminished intelligence and unable to control his impulses. This was the result of a motorcycle accident in 1985, after which he had been in a coma for three days.

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[2] The victim could not recall anything after this point until she was en route to the hospital the next day.

DISCUSSION

I

Before trial, the defendant moved to suppress the statements he made to the police on the morning after the attack. He claimed the police had failed to admonish him in accordance with *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*) before beginning custodial interrogation. He renews his contention on appeal and, like the trial court, we do not find it persuasive.

A deputy sheriff had received a report that the victim was missing. En route to her workplace, he received a request at 7:00 a.m. to report to the lobby of the county jail, where the defendant had told a clerk that his wife was dead. The deputy escorted the defendant out of the building. When the deputy asked why he was limping, the defendant said he had fought with his spouse.

The deputy was familiar with both the defendant and the victim from previous contacts. He asked the defendant if he would sit in the back of the patrol car, explaining that he was not under arrest. The deputy closed the door (at which point the defendant would not have been able to exit from the inside). The defendant was not in handcuffs. While waiting for a police officer to arrive, the deputy did not question the defendant. The defendant did not express any desire to get out of the car.

A Woodland police officer had been investigating the location at which the defendant said the victim could be found. However, only the defendant's children and parents were there.

The police officer then went to the jail to speak with the defendant.

The police officer opened the left rear door of the car. The defendant was sitting by the right door. When the police officer asked, "what was going on this morning," the defendant said that he had just killed his spouse. The police officer pointed out that the victim was not at the reported location; the defendant answered that she was in a residence in Knights Landing. After dispatching a unit to the residence, the police officer asked the defendant how he had killed her. He was concerned that the victim might still be in extremis, or that there might be a hazard to the rescuers (e.g., suffocation from natural gas). The defendant claimed that during an argument, his spouse had drawn a gun on him and he had stabbed her in response. When asked the basis for his belief that she was dead, the defendant said that she had fallen to the ground and that there had been much blood. This questioning lasted about three minutes.

The court noted the voluntary nature of the defendant's presence at the jail, and the absence of coercive circumstances. It rested its ruling, however, on an urgency exception to *Miranda* and found the police officer's concern with the victim's welfare to have been genuine and reasonable. It therefore found the defendant's responses admissible.

Putting aside the question of whether there was a *custodial* interrogation, there is a recognized exception to *Miranda* for questioning intended to protect the public safety (*New York v.*

Quarles (1984) 467 U.S. 649, 656-657 [81 L.Ed.2d 550]), which California courts have interpreted as extending to noncoercive questions intended to identify a risk to the life of a victim or others if no other course of action is open (*People v. Stevenson* (1996) 51 Cal.App.4th 1234, 1237-1239 [threat to defendant's own life from ingested contraband]; *People v. Riddle* (1978) 83 Cal.App.3d 563, 576-579 [missing victim]). The trial court credited the sincerity of the police officer's concern that the then-missing victim might still be alive. That a rescue unit was already on its way to the location of the victim does not dispel the value of additional information from the defendant about the condition in which he left her (indeed, without questioning him initially, the police officer would not have learned the correct location of the victim). Moreover, the testimony of the victim and the eyewitness testimony of the couple's children renders any possible error harmless beyond a reasonable doubt.

II

The defendant offered a special instruction in connection with the torture count. It provided, "The necessary specific intent to cause cruel or extreme pain cannot be inferred solely from evidence that the injury inflicted caused such pain. There must be other facts and circumstances which prove an intent to cause such pain." The court did not use this instruction.

The crime of torture does not include the victim's pain as an element. (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042 (*Jung*); Pen. Code, § 206.) However, a jury may consider both

the facts underlying the offense and other circumstantial evidence as evidence of the required specific intent. (*People v. Hale* (1999) 75 Cal.App.4th 94, 107 (*Hale*) [antecedent threats, false accusations of crime]; *Jung*, *supra*, 71 Cal.App.4th at pp. 1040, 1043 [keeping photographs of humiliation of victim with demeaning captions].)

The defendant does not contend that a victim's pain is a proscribed variable in the intent calculus (nor does he provide authority to that effect). He also does not cite any authority in support of his proposed instruction. Even assuming, however, that it is a correct statement of the law, the trial court did not err in rejecting it.

The trial court correctly instructed the jury that the victim's pain was not an element of torture, and that it must find both the infliction of great bodily injury and the intent to cause extreme pain for the purpose of either revenge, persuasion, or sadistic gratification in order to convict the defendant of torture. Nothing in this instruction suggests that the victim's pain of itself without any other circumstances would be sufficient to infer the defendant's intent to inflict extreme pain (especially as it instructs that the actual experience of pain is irrelevant to the offense). We will not ascribe to the jury such illogical reasoning. This is because a subjective perception of *extreme* pain, if not inherent in the act inflicting the injury or communicated to the perpetrator, has no connection of itself with the intent behind the act. Consequently, the trial court could believe the standard

instruction adequately covered the issue and the special instruction simply amounted to argument highlighting one category of circumstantial evidence and misleadingly suggesting that no circumstantial evidence other than the victim's pain existed. (*People v. Farmer* (1989) 47 Cal.3d 888, 913-914.)

III

A

The defendant contends the evidence is insufficient to support his torture conviction. We disagree.

The circumstances of the offense demonstrate that after shooting at the victim with a pellet gun, beating her over the head with it until it broke, possibly smothering her, and stabbing her with two different knives, the defendant jumped on her bleeding body and left her without any means of summoning aid. This is more than sufficient from which to infer an intent to inflict extreme pain. That it may also demonstrate an intent to kill the victim does not preclude a conviction for torture. (*Hale*, *supra*, 75 Cal.App.4th at pp. 106-107.) The jury could also reasonably infer a purpose of revenge for his exclusion from the family unit, or an effort to persuade her to abandon pending divorce proceedings. The defendant's arguments to the contrary are divorced from the reality of the evidence and disregard the nature of appellate review of facts presenting conflicting inferences.

B

The defendant contends there is insufficient evidence that his attempt to kill the victim was premeditated. The argument is misguided.

The defendant relies on the analytic paradigm that *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, articulated as a guide for appellate courts in determining the sufficiency of evidence of premeditation. He takes the discredited approach of using this template as a straightjacket on the manner in which premeditation is proven at trial. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 (*Perez*) ["*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation"].) Though possible that the defendant had merely hidden himself in the victim's home to talk with her about a rapprochement (parking his car elsewhere so as to avoid alerting her to his presence) and only responded violently without reflection when the victim attempted to flee from him, the evidence is also consistent with a preexisting plan to harm the victim, as he brought a pellet gun and a knife with him. Moreover, the length of the attack (during which he grabbed a new knife), the isolation of the grievously wounded victim where she was likely to die without being able to summon aid, and indications that the defendant returned (after leaving his children with his parents) to make ineffectual efforts at cleaning up the blood in the kitchen and probably to move the

victim to a bedroom[3] is sufficient to infer premeditation arising during the course of the attack. (Cf. *Perez*, *supra*, 2 Cal.4th at pp. 1126-1128 [use of second knife during course of attack, plus concealing car from view and methodical conduct after killing, sufficient to establish premeditation.) We thus reject this argument without belaboring the point by further discussing planning, motive, and manner of killing.

C

The People charged the defendant in count 5 with theft or unauthorized use of a Ford Tempo. (Veh. Code, § 10851, subd. (a).) The victim testified that she had bought the car while she and the defendant were still married and living together, and that she was not yet divorced from the defendant at the time of the attack. Although the defendant moved to dismiss this count as legally insufficient (Pen. Code, § 1118.1) because the People did not rebut the presumption that the car was community property, the trial court denied the motion because it believed the jury could infer an intent to deprive the victim permanently of her interest in the car when he took it. However, the court instructed the jury it could convict him on this count if it found an intent to deprive the victim of possession permanently or *temporarily*.

People v. Llamas (1997) 51 Cal.App.4th 1729 (*Llamas*) held that where the People have not rebutted a defendant's presumed

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[3] A police officer testified that he did not think the victim could have moved herself to the bedroom in her condition.

community property interest in a car, the defendant may not be legally convicted for a *temporary* deprivation of the spouse's possessory interest in the car, and that it is reversible error to instruct a jury on both permanent *and* temporary deprivation of possession of the car. (*Id.* at pp. 1739-1741.) We accept the People's concession that we must reverse the conviction.

Llamas allowed the People the opportunity to retry the count because there had not been any prior case putting them on notice of the need to rebut the presumption of community property or the need to eliminate a theory of temporary deprivation of possession from the standard instruction. (*Llamas, supra,* 51 Cal.App.4th at pp. 1742-1743.) The same cannot be said in the present case. We therefore will direct the trial court to dismiss the count (which has no effect on the defendant's prison term, as it represented a concurrent sentence).

DISPOSITION

The conviction on count 5 is reversed with directions to dismiss it. The judgment is otherwise affirmed. The trial court will prepare an amended abstract of judgment and forward it to the Department of Corrections.

DAVIS, J.

I concur:

SIMS, J.

I concur in the judgment and opinion except as to section I of the Discussion, as to which I concur in the result.

BLEASE, Acting P.J.